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UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA—SAN FRANCISCO DIVISION

19 SILKEN BROWN, et al.

## **CONSOLIDATED CLASS ACTION**

20 Plaintiff,

Case No.: CV 13-04030 WHO

21 | vs.

Hon. William H. Orrick

22 CINEMARK USA, INC., et al.

## **OPPOSITION TO MOTION TO DENY CERTIFICATION**

Defendants.

Hearing Date: September 3, 2014  
Time: 2 p.m.  
Courtroom: 2, 17<sup>th</sup> floor

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1     **I. INTRODUCTION**

2         The Court should deny Defendants Cinemark USA, Inc. and Century Theatres Inc.’s  
3         (collectively, “Cinemark”) preemptive motion for denial of class certification because Cinemark has (1)  
4         refused to produce contact information for the class members, who are indisputably percipient witnesses;  
5         (2) refused to produce any time records for the class members, which would show that it engaged in a  
6         class-wide practice of denying employees their legally required meal and rest breaks; and (3) filed this  
7         motion before permitting Plaintiffs to take the deposition of its Person Most Knowledgeable with respect  
8         to the policies and practices at issue, an essential fact-gathering tool for a class action plaintiff. Having  
9         denied Plaintiffs *any* meaningful classwide discovery, Cinemark now demands that the Court  
10      conclude—well before the class certification deadline, and before the pending discovery disputes are  
11      resolved—that class certification is legally impossible. It is axiomatic that a party cannot withhold  
12      crucial pre-certification discovery while moving on an issue that demands such discovery. Accordingly,  
13      it is premature for the Court to decide a Rule 23 motion.

14         In any event, even the existing evidence clearly demonstrates that class certification is not  
15      impossible as a matter of law, which is the standard that Cinemark must satisfy. For instance, evidence,  
16      including the testimony of the three named plaintiffs from different jobsites, shows that Cinemark had  
17      policies and practices that discouraged class members from taking their timely meal and rest breaks and  
18      encouraged unpaid off-the-clock work. Cinemark has also failed to rebut evidence that it had a policy of  
19      sending employees home before they completed at least half of their shift without providing reporting  
20      time pay. This evidence is sufficient for the Court to deny Cinemark’s preemptive motion to *deny* class  
21      certification.

22         Finally, Cinemark has not proffered any valid argument that this action cannot proceed under the  
23      Private Attorney General Act of 2004 (“PAGA”). In fact, Cinemark’s arguments that Rule 23’s class  
24      action requirements apply to representative PAGA actions are contrary to Ninth Circuit authority and the  
25      majority of district courts, including in this District. Accordingly even if the Court preemptively denies  
26      class certification (and it should not), it should permit the action to proceed on a representative basis  
27      under PAGA.

1       **II. FACTS AND PROCEDURE**

2           **A. Plaintiffs Each Held Multiple Job Titles and Suffered From the Same Policies And**  
 3           **Practices**

4       Plaintiff Silken Brown worked for Cinemark for only seven months, but performed at least four  
 5 unique roles at a San Francisco theater, including Cash Handler, Concessions Worker, Usher, and a role  
 6 involving janitorial duties. *See* Declaration of Stan Karas, Exh. A (Brown Depo. at 47:3-48:1). Plaintiff  
 7 Mario De La Rosa worked as a projectionist, a “rover,” and multiple types of ushers in Tracy during his  
 8 one and one-half years at Cinemark. *See id.*, Exh. B (De La Rosa Depo. at 64:10-21, 88:6-18). Plaintiff  
 9 Joseph Amey has worked for Cinemark since June 2003 (*see id.*, Exh. C (Amey Depo. at 33:2-4));<sup>1</sup>  
 10 having worked in concessions and the box office before he was promoted to Assistant Store Manager in  
 11 2005. *Id.* at 44:10-45:3. Mr. Amey has worked at four different Cinemark locations. *Id.* at 33:5-15.

12       Despite the fact that the three named Plaintiffs worked at different locations and in different  
 13 roles, all three were subject to the same unlawful policies and practices related to understaffing,  
 14 discussed below. Indeed, Cinemark admits that the exact same policies and practices, regarding meal  
 15 and rest breaks (Motion at 12:20-21 and 4:11-5:20), off-the-clock work (Motion at 5:21-6:18), and  
 16 reporting pay (Motion at 6:19-24 and 16:26-17:7) applied to all Class Members. In other words, all  
 17 asserted claims in this matter involve policies and practices common to all Class Members.

18           **B. Cinemark Routinely Understaffs Weekend and Holiday Shifts**

19       All three Plaintiffs testified that Cinemark’s policy and practice of understaffing affected their  
 20 ability to take breaks. *See* Brown Depo. at 95:25-97:11, 138:5-25 (weekends, premiers, and holidays  
 21 were insanely busy, which made it much more difficult to take breaks); De La Rosa Depo. at 83:20-23  
 22 (more difficult to get breaks on weekends); Amey Depo. at 65:22-71:19, 131:14-19 (understaffing led to  
 23 frequent violations; insufficient staff to take breaks); Amey Depo. at 65:22-66:25 (employees must  
 24 schedule breaks around others’ schedules, especially when limited to “skeleton crews”); Amey Depo. at  
 25 69:16-71:19 (staff was especially insufficient during holidays, premiers, and during the summer).  
 26 Plaintiff Amey further explained that the identity of the manager on duty makes no difference for break

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 28       

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<sup>1</sup> For the Court’s convenience further references to the Plaintiffs’ testimony will be to the  
 pertinent excerpts of the deposition transcripts attached to the Karas Declaration as Exhibits A, B and C.

1 violations caused by understaffing. *See* Amey Depo. at 131:25-132:12.

2       **C. Cinemark Maintains a Policy Requiring Employees to Wait for Managers to  
3           Individually Authorize Rest Periods**

4       All Plaintiffs testified that they must wait for a manager's authorization to take rest breaks.  
5 Plaintiff Brown explained that Cinemark maintains a policy whereby employees must check with  
6 managers before taking breaks. *See* Brown Depo. at 69:7-25. Managers instruct employees when to take  
7 breaks. *See* De La Rosa Depo. at 79:14-20; Amey Depo. at 206:19-207:17. Employees have to wait to  
8 take breaks if they cannot locate a manager. *See* Brown Depo. at 134:15-23. One obvious problem this  
9 policy causes is that managers instruct employees to take breaks late. *See* Amey Depo. at 78:11-79:12,  
10 84:25-85:22. Managers also instruct employees to remain nearby during rest breaks in case they are  
11 needed. Brown Depo. at 73:2-5. In other words, managers are prepared to interrupt an employee's  
12 break whenever the employee may be needed for theater operations.

13       **D. Cinemark's Policies and Practices Result In Frequent Interrupted and, Therefore  
14           Non-Compliant, Breaks**

15       All Plaintiffs report that customers frequently interrupted their meal and rest breaks. Customers  
16 grabbed employees during breaks, even if employees removed their badges; often there were no  
17 coworkers around to answer the customer's questions; employees felt obligated to help customers  
18 because of Cinemark's policy that the customer is always right. *See* De La Rosa Depo. at 116:8-123:25.  
19 *See also* Brown Depo. at 154:11-155:8 (customers frequently interrupted her breaks; she witnessed other  
20 employees experiencing similar violations); Amey Depo. at 182:8-183:23 (customers interrupt  
21 employees' breaks).

22       **E. Cinemark's Policies and Practices Resulted in Off-the-Clock Work**

23       All Plaintiffs report that they experienced unpaid hours due to off-the-clock ("OTC") work. *See*  
24 Brown Depo. at 137:8-138:25 (asked to perform work OTC); Brown Depo. at 144:8-147:24 (saw others  
25 perform work OTC); Brown Depo. at 144:8-145:16 (didn't know OTC was a violation); De La Rosa  
26 Depo. at 252:18-24 ("Q: During the time that you worked at the Tracy theater from 2008 to 2010, did  
27 you ever ask – were you ever asked to perform any work after you had already clocked out? A: Yes. Q:  
28 When did that happen? A: Um, a couple times during my closing shifts."); *id.* at 253:13-20 (when asked

1 how often OTC work occurred, "I'd probably say maybe 10 to 15 percent of the time"); De La Rosa  
 2 Depo. at 254:6-11 (managers were aware of the OTC work); Amey Depo. at 184:21-185:11 (suffered  
 3 from OTC work).

### 4 III. ARGUMENT

#### 5 A. Cinemark May Not Block Basic Class Discovery While Simultaneously Moving for 6 Preemptive Denial Of Class Certification

7 It is black letter law that prior to judicial decision on a Rule 23 motion, the parties are entitled to  
 8 conduct discovery in order to provide the court with evidence outside the pleadings that support (or  
 9 refute) certification. *See Vinole v. Countrywide Home Loans*, 571 F.3d 935, 941 (9th Cir. 2009) ("The  
 10 'better and more advisable practice' for a district court is to give the litigants an opportunity to present  
 11 evidence regarding whether a class action is maintainable") (citation omitted); *Kamm v. Cal. City*  
 12 *Development Co.*, 509 F.2d 205, 210 (9th Cir. 1975) ("The propriety of a class action cannot be  
 13 determined in some cases without discovery, as, for example, where discovery is necessary to determine  
 14 the existence of a class or set of subclasses"); *Stewart v. Winter*, 669 F.2d 328, 331 (5th Cir. 1982) ("in  
 15 most cases a certain amount of discovery is essential in order to determine the class action issue and the  
 16 proper scope of a class action").

17 Here, Cinemark continues to refuse to provide basic class discovery to which Plaintiff is entitled.  
 18 After removal and transfer of the action to this Court, discovery commenced under the federal rules.<sup>2</sup> On  
 19 March 28, 2014, Plaintiffs served Cinemark with interrogatories and document requests. Karas Decl.,  
 20 Exh. D. Among the requested information was a list of class members and their contact information.  
 21 Such discovery is routinely held to be proper in class actions because class members are perciptent  
 22 witnesses to the illegal practices alleged in the complaint. *See, e.g., Artis v. Deere & Co.*, 276 F.R.D.  
 23 348, 352 (N.D. Cal. 2011) ("The disclosure of names, addresses, and telephone numbers [of class  
 24 members] is a common practice in the class action context."); *Kress v. Price Waterhouse Coopers*, 2011  
 25 U.S. Dist. LEXIS 87845 (E.D. Cal. Aug. 8, 2011) (same); *Pioneer Electronics (USA), Inc. v. Superior*  
 26 *Court*, 40 Cal. 4th 360, 373 (2007) (in class actions, "[c]ontact information regarding the identity of

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28 <sup>2</sup> The Court held a Case Management Conference on May 20, 2014 at which it set September  
 25, 2014 as the due date for Plaintiffs to file their motion for class certification.

1 potential class members is generally discoverable, so that the lead plaintiff may learn the names of other  
 2 persons who might assist in prosecuting the case"). Plaintiffs also requested time and wage records of  
 3 class members, because this information would show the frequency with which class members' breaks  
 4 were taken late, were interrupted and/or were not taken at all.

5 On May 8, 2014, Cinemark objected to these discovery requests and refused to produce the  
 6 requested information. *Id.*, Exh. E. On June 17, 2014, Plaintiffs sent a detailed meet and confer letter.  
 7 *Id.*, Exh. F. On July 1, 2014, the parties participated in a telephonic meet and confer during which they  
 8 discussed Cinemark's objections and Plaintiffs suggested the idea of production of a sampling of the  
 9 requested records. *Id.*, ¶ 8. On July 23, 2014, in order to resolve the discovery dispute without having to  
 10 resort to the Court's assistance, Plaintiffs proposed in an email that Cinemark produce a 33% sampling  
 11 of the requested records. *Id.*, Exh. G.

12 On July 30, 2014, the parties participated in another telephonic meet and confer, purportedly to  
 13 discuss Plaintiffs' sampling proposal. Karas Decl., ¶ 10. Unexpectedly, Cinemark's counsel flatly  
 14 refused to produce even a sampling of the requested information and informed Plaintiffs' counsel that  
 15 Cinemark would file a preemptive motion for denial of class certification, which it did minutes after the  
 16 parties concluded their call. *Id.*, ¶ 11. Cinemark had not previously informed Plaintiffs that it was  
 17 contemplating filing such a motion, let alone that it was preparing this motion while Plaintiffs were in  
 18 good faith discussing an informal resolution of their discovery dispute. *Id.*, ¶ 12. On August 8, 2014,  
 19 Plaintiffs served Cinemark with their portion of the joint statement regarding Plaintiffs' motion to  
 20 compel. The parties plan to present the Court with the joint statement on August 13, 2014.

21 During the July 30, 2014 call, Plaintiffs' counsel met and conferred with Cinemark's counsel to  
 22 try to identify a mutually-convenient date for the deposition of Cinemark's Rule 30(b)(6) witness, in  
 23 compliance with Local Rule 30-1 and in order to avoid scheduling a deposition for a date that could be  
 24 inconvenient for the witness, Cinemark, or its counsel. Karas Decl., ¶ 13.<sup>3</sup> Plaintiffs' counsel even  
 25 provided Cinemark with a list of topics of testimony that would be included in the Rule 30(b)(6)  
 26 deposition notice. *Id.*, Exh. H. On August 4, 2014, Cinemark's counsel offered three dates for

27 \_\_\_\_\_  
 28 <sup>3</sup> Cinemark's failure to produce complete employee handbooks and its delays in responding to  
 Plaintiffs' sampling proposal forced Plaintiffs to delay serving a Rule 30(b)(6) notice because Plaintiffs  
 need to depose Cinemark's corporate representative on these documents.

1 deposition: one six days *after* the Court is scheduled to hear Cinemark's motion for denial of class  
 2 certification (September 9, 2014), one *on the date that Plaintiff's motion for class certification is*  
 3 *currently due* (September 25, 2014), one *on the day after the motion is due* (September 26, 2014). *Id.*,  
 4 Exh. I.

5 Under settled law, Plaintiffs are entitled to interview class members, who are indisputably  
 6 percipient witnesses to Cinemark's alleged illegal practices. This is especially important because such  
 7 interviews are the only means to level the playing field because Cinemark's counsel by definition have  
 8 the contact information, and thus exclusive access to these witnesses. *Campbell v. Wood*, 18 F.3d 662,  
 9 723 (9th Cir. 1994) ("We ordinarily understand that the truth is most readily uncovered when each party  
 10 has equal access to the evidence"). Plaintiffs are also entitled to examine the time and wage records of  
 11 the class members to rebut Cinemark's bare contention that it provides meal and rest periods in  
 12 compliance with California law. Indeed, this information will assist Plaintiffs in confirming Cinemark's  
 13 pattern and practice of denying meal and rest breaks to employees during the class period without paying  
 14 premiums for those interrupted, missed or late breaks. Plaintiffs are also entitled to cross-examine  
 15 Cinemark's corporate designee, and to conduct this deposition early enough to be able to incorporate this  
 16 testimony in their motion for class certification. In sum, Plaintiffs are entitled to conduct basic class  
 17 discovery before the Court rules upon a Rule 23 motion. Cinemark , however, has prevented Plaintiffs  
 18 from presenting the Court with all relevant information.

19 The Court should not rule on an incomplete record. Cinemark does not cite any authority  
 20 permitting a preemptive denial of certification before Plaintiffs had an opportunity to conduct class  
 21 discovery.<sup>4</sup> Although the Ninth Circuit has held that motions to deny certification may be appropriate  
 22 (*Vinole v. Countrywide Home Loans, Inc.*, 571 F.3d 935 (9th Cir. 2009)), that case involved a motion to  
 23 deny certification filed a mere three weeks before the discovery cut-off and the plaintiffs conceded that  
 24 they "did not intend to propound any additional discovery seeking information from [the defendant]  
 25 regarding the propriety of class certification." *Id.*, at 943. The Ninth Circuit explained "Plaintiffs' real

26 \_\_\_\_\_  
 27 <sup>4</sup> In fact, the cases that Cinemark cites were generally decided after exhaustive class discovery.  
 28 In the outlier *Ryan v. Jersey Mike's Franchise Sys.*, 2014 U.S. Dist. LEXIS 42677 (S.D. Cal. Mar. 27,  
 2014), the court denied class certification because the plaintiff's testimony affirmatively showed that he  
 was not a member of the class that he sought to represent and could not state a credible theory of liability.  
 Cinemark does not – and cannot – claim that is the case here.

1 complaint is *not that they were deprived of adequate time in which to complete discovery* but that they  
 2 ‘didn’t want to be on defendants’ schedule.’” *Id.* (emphasis added).

3 That is plainly not the case here: Plaintiffs have not completed discovery and the Court should  
 4 either deny the Motion on that ground or continue the hearing date for the Motion to permit Plaintiffs to  
 5 complete discovery. The remaining discovery is vital to establishing Plaintiffs’ class claims. For  
 6 instance, timekeeping records are likely to show that most class members missed meal periods during  
 7 weekends and major holidays, when the theaters were most busy and most understaffed. Cross-checking  
 8 timekeeping records with a schedule of major movie premieres is also likely to reveal that most class  
 9 members missed meal period on such days. Similarly, depositions of corporate witnesses might reveal  
 10 that Cinemark resolved to understaff certain shifts so that employees cannot take meal or rest periods in  
 11 order to reduce labor costs. At this stage, the Court cannot determine where there is substantial evidence  
 12 supporting (or rebutting) certification because Cinemark has refused to disclose key documents and  
 13 information absent court intervention, which Plaintiffs are seeking.

14 **B. Cinemark Has Failed to Demonstrate That Plaintiffs are Unable to Satisfy the  
 15 Requirements for Class Certification**

16 **1. The Commonality Standard**

17 The commonality requirement of Rule 23(a) is readily satisfied where a lawsuit “challenges a  
 18 system-wide practice or policy that affects all the putative class members.” *Armstrong v. Davis*, 275  
 19 F.3d 849, 868 (9th Cir. 2001). Plaintiffs need not show, however, that “every question in the case, or  
 20 even a preponderance of questions, is capable of class wide resolution. So long as there is ‘even a single  
 21 common question,’ a would-be class can satisfy the commonality requirement of Rule 23(a)(2).”  
 22 *Parsons v. Ryan*, 754 F.3d 657, \*43 (9th Cir. 2014) (citation omitted); *see also Mazza v. Am. Honda*  
 23 *Motor Co., Inc.*, 666 F.3d 581, 589 (9th Cir. 2012) (noting that “commonality only requires a single  
 24 significant question of law or fact”). “Where the circumstances of each particular class member vary but  
 25 retain a common core of factual or legal issues with the rest of the class, commonality exists.” *Evon v.*  
 26 *Law Offices of Sidney Mickell*, 688 F.3d 1015, 1029 (9th Cir. 2012) (quotation marks and citation  
 27 omitted).

28 State and federal law alike require that “questions of law or fact common to class members

1 predominate over any questions affecting only individual members.” Rule 23 (b)(3); *see also Collins v.*  
 2 *Rocha*, 7 Cal. 3d 232, 238 (1972); *Newell v. State Farm General Ins. Co.*, 118 Cal. App. 4th 1094, 1101  
 3 (2004). Predominance is determined not by counting the number of common issues, but by weighing  
 4 their significance. *Mullen v Treasure Chest Casino, LLC*, 186 F.3d 620, 626-27 (5th Cir. 1999).  
 5 Predominance of common issues of law or fact does not require that the common issues be dispositive of  
 6 the entire controversy or even that they be dispositive of liability issues. 2 *Newberg* § 4:25 at 169.  
 7 “Predominance is a comparative concept and ‘the necessity for class members to individually establish  
 8 eligibility and damages does not mean individual fact questions predominate.’” *Sav-On Drug Stores,*  
 9 *Inc. v. Superior Court*, 34 Cal. 4th 319 (2004) (internal citation omitted).

10 Here, the overriding common questions to be answered contain both the predominant legal and  
 11 factual issue (whether Cinemark’s understaffing policies and practices caused a failure to provide meal  
 12 and rest periods and failure to pay wages, including overtime and reporting time pay and whether  
 13 Cinemark’s reporting time policies and practices led to unpaid wages). This inquiry is amenable to class  
 14 treatment and Cinemark’s Motion fails to prove otherwise. *See generally Jaimez v. DAIOHS USA, Inc.*,  
 15 181 Cal. App. 4th 1286, 1301 (2010).

16           **2. Cinemark Has Failed to Demonstrate That Plaintiffs Cannot Satisfy**  
 17           **Certification Requirements as to the Meal and Rest Period Claims**

18           **(a) Common Policies and Practices**

19 Cinemark bemoans a host of purported differences between its theaters but offers no explanation  
 20 as to why these so-called “individual circumstances” are relevant to commonality when considering  
 21 *Plaintiffs’ theory of recovery*.

22 The evidence has already revealed a wealth of commonality. Cinemark admits that the exact  
 23 same policies and practices, regarding meal and rest breaks (*see Motion* at 12:20-21 and 4:11-5:20), off-  
 24 the-clock work (*see id.* at 5:21-6:18), and reporting pay (*see id.* at 6:19-24 and 16:26-17:7), applied to all  
 25 Class Members. All Plaintiffs testified that Cinemark frequently understaffs its theaters. *See Brown*  
 26 Depo. at 96:4-97:11, 138:5-25; *De La Rosa* Depo. at 83:20-23; *Amey* Depo. at 65:22-66:25, 70:18-  
 27 71:19, 131:14-19. All Plaintiffs testified to the policy and practice that Class Members report to  
 28 managers before taking breaks. *See Brown* Depo. at 69:7-25, 134:15-23; *De La Rosa* Depo. at 79:14-20;

1 Amey Depo. at 78:11-79:12, 84:25-87:1, 206:19-208:8. All employees suffered from interrupted breaks.  
 2 See De La Rosa Depo. at 116:8-123:25; Brown Depo. at 154:11-155:21; Amey Depo. at 182:8-183:23.  
 3 All employees reported working off-the-clock. See Brown Depo. at 137:8-138:25, 144:8-145:16,  
 4 146:22-147:24; De La Rosa Depo. at 252:18-24, 253:13-20, 254:6-11; Amey Depo. at 184:21-185:11.

5 Cinemark also argues that non-exempt employees missed breaks for many reasons which would  
 6 necessarily require the Court to preside over individual mini-trials. Motion at 9:11-25. Specifically,  
 7 Cinemark argues that for each non-exempt employees' missed rest break, the Court would have to  
 8 determine whether Cinemark required the non-exempt employee to miss a meal or rest break, or whether  
 9 the non-exempt employee did so for lawful reasons. Motion at 9:24-25. Again, Cinemark fails to  
 10 consider Plaintiffs' limited theory of recovery. Plaintiffs only allege that Cinemark is liable as a result of  
 11 its uniform policy and practice of understaffing. The fact that non-exempt employees may have varying  
 12 amounts of damages is not relevant at the certification stage, discussed below in section II(B)(2)(c).

13 **(b) Subclasses Can Accommodate Variations, If Necessary**

14 Cinemark's Motion takes the blunt—and erroneous—position that Plaintiffs must certify all  
 15 claims and all positions as a single class or else fail to certify anything. As this Court and Cinemark  
 16 know, large classes such as this putative class which includes more than 10,000 members, are often  
 17 divided into subclasses. *See, e.g., Josue Soto, et al. v. Diakon Logistics (Delaware), Inc.*, 2013 U.S. Dist.  
 18 LEXIS 119028 (N.D. Cal. Aug 2013) (granting third motion for class certification after subclasses were  
 19 created); *Seckler v. Kindred Healthcare*, 2013 U.S. Dist. LEXIS 29940 (C.D. Cal. March 5, 2013)  
 20 (certifying overtime, regular rate, meal waiver, and wage statement subclasses). Thus, the relevant  
 21 question is not whether every single employee experienced the same violations for the same reasons, as  
 22 Cinemark suggests. Rather, the relevant question at this stage is whether Plaintiffs could certify a class  
 23 or classes/subclasses. At this stage, it is unclear exactly what class members will report regarding each of  
 24 the many positions because Cinemark has refused to produce contact information for these percipient  
 25 witnesses. Plaintiffs, however, have the option of moving to certify subclasses, such as an Assistant  
 26 Manager subclass, and multiple subclasses of non-management positions such as an usher subclass.

27 Some variation in duties and resulting violations is not surprising given the diverse job functions.  
 28 A subclass might be built around job functions for which the employee must wait for coverage before

leaving to take a break. *See* De La Rosa Depo. at 86:4-8. (concessions employees must wait for another employee to cover breaks), 141:13-21 (as a podium usher, you cannot leave the podium, even to use the restroom), 224:21-25 (“When it came to the podium it was a little bit more difficult because it wasn’t like we had seven, eight ushers like we did back in ’98 and ’99. You know, now it was literally, you know, two, three, four, if we were lucky.”). Job functions like projectionist might be excluded or otherwise subclassed. *See* Amey Depo. at 192:18-193:3 (theater went digital around 2008 or 2009, making projectionist job more automated and less time-consuming); De La Rosa Depo. at 89:15-90:2 (projectionists usually take breaks between movies while ushers take breaks during movies), 90:22-91:2 (breaks were easier as a projectionist). Similarly, Plaintiffs might seek to certify a subclass of rovers and projectionists because neither job requires another employee to help cover. *See* De La Rosa Depo. at 222:2-12 (“[as a rover] It was a little bit easier for me to know when to take my lunch and be able to do it”).

Finally, a management-level subclass might be created if class members report that the types of violations, or the causes of violations, experienced by Assistant Managers differ from other employees. For instance, Plaintiffs testified that managers often covered for other employees so they could take breaks. *See De La Rosa Depo.* at 68:2-12 (managers cover for people during breaks), 82:11-23, 86:11-20 (managers covered during busier times). Thus, understaffing would be the cause of each employees' break violations but for slightly different reasons for an Assistant Manager who must cover others' breaks than it would be for a concessions worker.

**(c) Damages and Liability Are Not Relevant At This Stage**

21 Cinemark’s arguments claiming that its meal and rest period policies are inappropriate  
22 at the class certification stage. The Ninth Circuit recently made clear that courts should not evaluate the  
23 merits at the certification stage. *See Stockwell v. City and County of San Francisco*, N.D. Cal. Case  
24 No.12-15070, D.C. No. 4:08-cv-05180-PJH (9th Cir. Apr. 24, 2014) (“We conclude that the district  
25 court erred in denying class certification because of its legal error of evaluating merits questions, rather  
26 than focusing on whether the questions presented, whether meritorious or not, were common to the  
27 members of the putative class”).

Even if this Court eventually needs to determine individual damages issues (which would occur

1 only if Plaintiffs prevailed on liability), such determinations would not negatively impact the efficiency  
 2 of certification since the Court can use an array of available common tools to award them.<sup>5</sup> The need to  
 3 determine individual damages (which is present in all class actions) does nothing to limit the utility of  
 4 adjudicating the overarching liability question – *i.e.* the lawfulness of Cinemark’s understaffing policy  
 5 and practice and customer service policies – for all class members in one proceeding. As explained  
 6 above, this question can be answered once for all non-exempt employees because the answer is not  
 7 dependent on what any particular non-exempt employee did, but on what *Cinemark* did, as it was  
 8 *Cinemark* that chose whether to provide sufficient staff so that employees receive breaks. Because  
 9 Cinemark has failed to disprove that common questions of law and fact predominate, its Motion should  
 10 not be granted.

11                   **3. Cinemark Has Failed to Demonstrate That Plaintiffs Cannot Satisfy**  
 12                   **Certification Requirements as to the Reporting Time Pay Claims**

13                   Cinemark concedes that it had a practice of sending employees home before they had an  
 14 opportunity to work at least half of their scheduled shift. Motion at 17:17-19. Cinemark also does not  
 15 dispute that employees subject to this practice were illegally denied reporting time pay, as required by  
 16 IWC Wage Order No. 10-2001 subd 5(A). Cinemark also does not dispute that Plaintiff Brown, who is  
 17 the class representative on this claim for failure to provide reporting time pay, was subject to its illegal  
 18 policy. These facts alone establish that the Court should not pre-emptively deny class certification.

19                   Cinemark seeks to downplay its class-wide violations of the reporting time law by arguing that  
 20 employees’ experiences with respect to being sent home before completing at least half of their shift  
 21 differed because some employees may have left early due to personal emergencies or by choice. This is

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22                   <sup>5</sup> Again, individual issues requiring that each class member individually establish his/her  
 23 eligibility to make a claim for their specific damages do **not** render class treatment inappropriate as long  
 24 as these issues may be effectively managed. *Sav-On*, 34 Cal.4th at 334-335. In any event, individual  
 25 damages can be determined through well-established, efficient and easily-managed procedures,  
 26 including, for example, the use of questionnaires, surveys or representative sampling and testimony. *See*,  
 27 *e.g.*, *Bell v. Farmers Ins. Exchange*, 115 Cal. App. 4th 715, 750 (2004). Not only do individual issues  
 28 regarding each class member’s specific amount of damages not render class treatment inappropriate, the  
 correct formula for determining wages due presents yet another class-wide issue for determination. Such  
 formulaic approaches have been found particularly useful where, as here, defendant’s lack of records  
 would make reconstructing the precise number of rest breaks missed a cumbersome process. *See, e.g.*,  
*Stewart v. General Motors Corp.*, 542 F.2d 445 (7th Cir. 1976); *EEOC v. O & G Spring & Wire Forms  
 Spec. Co.*, 38 F.3d 872, 876 (7th Cir. 1994); *Hilao v. Estate of Marcos*, 103 F.3d 767, 782-87 (9th Cir.  
 1996); *Domingo v. New England Fish Co.*, 727 F.2d 1429, 1444-45 (9th Cir. 1984).

a red herring. Plaintiffs' theory of liability is not that every employee who completed less than half of his or her scheduled shift is entitled to reporting time pay. Instead, every employee who was asked by a manager to leave early is entitled to such relief. Cinemark concedes that “[i]f the theatre was slow, the manager would ... ask for volunteers to leave early, and . . . *if there were no volunteers, . . . employees [would] be sent home.*” Motion at 17:17-19 (emphasis added). Cinemark also does not dispute that employees that were required to leave before completing half of their shift, including Plaintiff Brown, were denied reporting time pay. This amounts to a concession of an illegal class-wide policy, which renders the reporting time claim eminently suitable for class certification.

Cinemark claims that individual inquiries are necessary to determine the reason an employee left before completing at least a half of his or her shift. But what matters at class certification is not Cinemark’s liability to any individual employee, but rather the legality of Cinemark’s admitted policy of sending employees home early without providing reporting time pay. Whether this policy is legal is a common class-wide issue and class certification would enable the Court to “resolve [this] issue that is central to the validity of each one of the [individual] claims in one stroke.” *Wal-Mart Stores, Inc. v. Dukes*, 131 S. Ct. 2541, 2551 (2011). Whether any individual class member is entitled to recovery stemming from this illegal policy is a question of damages, not liability, which does not defeat certification. *Leyva v. Medline Indus., Inc.*, 716 F. 3d 510, 513-14 (9th Cir. 2013); *see also Gripenstraw v. Blazin’ Wings, Inc.*, 2013 U.S. Dist. LEXIS 179214, \*\*21-23 (E.D. Cal. Dec. 19, 2013) (even when “wide divergence on the question of damage calculations for proposed class members” is expected, that divergence does not defeat a finding of predominance under Rule 23(b)(3)); *Brinker Restaurant Corp. v. Super. Ct.*, 53 Cal. 4th 1004, 1044 (2012) (instructing that classes “will be certified even if the members must individually prove their damages”). Accordingly, the purported individual inquiries that Cinemark emphasizes are fully consistent with class treatment of the common issue of Cinemark’s liability for its illegal reporting time policy.<sup>6</sup>

<sup>6</sup> Cinemark does not dispute that members of the reporting time subclass may be easily identified by a review of Cinemark's time records because these records would show which employees clocked out before completing at least one half of their scheduled shift.

1                   **4.       Cinemark Has Failed to Demonstrate That Plaintiffs Cannot Satisfy**  
 2                   **Certification Requirements as to the Off-the-Clock Claims**

3                   Cinemark’s argument that the off-the-clock claim is uncertifiable fails for several independent  
 4                  reasons.

5                   Cinemark first claims that its liability depends on whether Plaintiffs’ managers knew or should  
 6                  have known that Plaintiffs were working off-the-clock. This merits issue need not be addressed upon a  
 7                  procedural motion for class certification (or preemptive denial thereof). As Cinemark’s own authority  
 8                  recognizes, “the Court’s review of the merits is limited to those aspects relevant to making the  
 9                  certification decision on an informed basis.” *Collins v. ITT Educ. Servs.*, 2013 U.S. Dist. LEXIS  
 10                 183410, \*6 (S.D. Cal. July 29, 2013); *see also Arredondo v. Delano Farms Co.*, 2014 U.S. Dist. LEXIS  
 11                 22658, \*27 (E.D. Cal. Feb. 21, 2014) (“At the class certification stage, ‘the court makes no findings of  
 12                 fact and announces no ultimate conclusions on Plaintiffs’ claims’”).

13                  In any event, Cinemark concedes that its managers asked Plaintiffs Brown and De La Rosa to  
 14                  work off-the-clock. *See Motion at 18:7-8* (“Brown and De La Rosa admitted that . . . certain managers  
 15                  asked them to work off the clock”), 18:24-25 (acknowledging Plaintiffs’ testimony that managers  
 16                  required them to work off the clock). There is, therefore, ample evidence that Cinemark’s managers  
 17                  knew, or at the very least should have known, that employees were performing work without pay.

18                  Cinemark also claims that Plaintiffs cannot identify the dates they worked off-the-clock and have  
 19                  not produced documents supporting their claims. Cinemark conspicuously ignores the fact that off-the-  
 20                  clock work *by definition* would not be memorialized in Cinemark’s time records. Cinemark also holds  
 21                  Plaintiffs and other class members to an artificially high burden of proof. For the purposes of damages  
 22                  analysis the specific dates on which employees worked off-the-clock is irrelevant. What matters is the  
 23                  frequency and during of off-the-clock work. Plaintiffs may properly establish off-the-clock damages by  
 24                  utilizing “numerous efficient means to resolve such issues, including questionnaires, surveys,  
 25                  representative testimony, and other aggregate analysis.” *Kurihara v. Best Buy Co., Inc.*, 2007 U.S. Dist.  
 26                 LEXIS 64224, \*32 (N.D. Cal. 2007) (citing *Whiteway v. Fedex Kinko’s Office and Print Servs., Inc.*,  
 27                 2006 U.S. Dist. LEXIS 69193, at \*29-\*30 (N.D. Cal. Sept. 27, 2006); *see also Alvarez v. IBP, Inc.*, 339  
 28                 F.3d 894, 900 (9th Cir. 2003) (affirming the use of approximations of unpaid compensable time to award

1 damages in a wage and hour action); *Sullivan v. Kelly Servs.*, 268 F.R.D. 356, 365 (N.D. Cal. 2010) (the  
 2 “use [of] statistical evidence, including surveys or representative testimony, or both, of class members . . .  
 3 . is commonly accepted by courts for calculating damages in large class actions”) (citations omitted);  
 4 *Arredondo*, 2014 U.S. Dist. LEXIS 22658, \*170 (“[t]he Ninth Circuit itself has . . . suggested that use of  
 5 questionnaires to effectively and efficiently identify and manage class litigation is permissible”)  
 6 (citations omitted); *Brinker*, 53 Cal. 4th at 1053 (Werdegar J., concurring) (“Representative testimony,  
 7 surveys, and statistical analysis all are available as tools to render manageable determinations of the  
 8 extent of liability”) (citations omitted).

9 Further, how often and how long class members worked off-the-clock is a damages issue, and it  
 10 is black letter law that class certification is proper even if it leaves individual damages issues to be  
 11 resolved after a finding of class-wide liability. NEWBERG ON CLASS ACTIONS § 4:26, p. 220 (4th  
 12 ed. 2003) (“individual proof of damages will not preclude a finding of predominance”).<sup>7</sup>

13 Cinemark’s sole case authority is inapposite. In *Collins v. ITT Educ. Serv. Inc. Co.*, the  
 14 defendant promulgated a formal written policy to its managers strictly prohibiting them from asking  
 15 employees to work off-the-clock. *Id.*, at \*10 (“In connection with the revised policy, the managers were  
 16 admonished: “This is why [it] is very important to consistently discipline those non-exempt employees  
 17 who violate the Company’s restriction on working unauthorized overtime.”“) Cinemark has not cited to  
 18 any such policy in its Motion. It is well settled the absence of such a policy that renders liability suitable  
 19 for determination on a classwide basis. As the California Court of Appeal explained in *Bradley v.*  
 20 *Networkers Internat., LLC*, 211 Cal. App. 4th 1129, 1150 (2012): There is no “material distinction”  
 21 between challenging the lawfulness of an express policy and the lack of an express policy. *Id.* Where  
 22 the plaintiff’s theory of liability is that “the employer engaged in uniform companywide conduct that  
 23 allegedly violated the law,” whether that conduct is the result of an express policy or the lack of one, it is  
 24 a matter of common proof. *Id.* (citing *Brinker*, 53 Cal. 4th at 1025, 1033). In *Bradley*, a class of field

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25       <sup>7</sup> Cinemark also notes that Plaintiffs did not report off-the-clock to their supervisors. The  
 26 argument is a non-sequitur because Plaintiffs testified that it was their supervisors that requested them to  
 27 work off-the-clock in the first place. It is not clear what effect the reporting of the supervisors’ own  
 28 actions to those same supervisors would have accomplished. More importantly, Cinemark does not and  
 cannot cite any case where class certification was denied simply because the plaintiff failed to report the  
 illegal conduct to the company engaged in such conduct. Instead, the class certification inquiry is  
 bounded by the requirements of Rule 23.

1 technicians challenged the fact that the defendant “did not have a policy permitting or authorizing meal  
 2 or rest breaks.” *Id.* The appellate court held that “the lack of a meal/rest break policy and the uniform  
 3 failure to authorize such breaks are matters of common proof.” *Id.* See also *Faulkinbury v. Boyd &*  
 4 *Assocs., Inc.*, 216 Cal. App. 4th 220, 236-37 (2013) (predominant common question was “the lawfulness  
 5 of [Defendant] Boyd’s lack of a rest break policy and requirement [that] all security guard employees  
 6 remain at their posts.”)

7 Moreover, in *Collins*, the plaintiffs had a full opportunity to conduct class discovery. In stark  
 8 contrast, here, Cinemark has obstructed class discovery while concurrently filing a preemptive motion to  
 9 deny certification. Further, the defendant in *Collins* “submitted numerous declarations from putative  
 10 class members and other representatives, showing their respective experiences with overtime differed.”  
 11 Cinemark makes no such showing here, even though it presently has exclusive access to the class  
 12 members. And even if Cinemark had submitted class member declarations, it would be improper for the  
 13 Court to consider them because Cinemark is denying Plaintiffs’ access to these important percipient  
 14 witnesses.<sup>8</sup>

15 Finally, Cinemark also ignores the fact that courts routinely certify off-the-clock class claims.  
 16 See, e.g., *Jimenez v. Allstate Ins. Co.*, 2012 U.S. Dist. LEXIS 65328, \*58 (C.D. Cal. Apr. 18, 2012)  
 17 (“Defendant is correct that overtime claims may present a number of individualized questions, including  
 18 whether individual employees worked off-the-clock. Nonetheless, courts have certified classes and  
 19 allowed collective actions to proceed notwithstanding such circumstances.”) (citations omitted); *Ross v.*  
 20 *US Bank Nat'l Ass'n*, 2009 U.S. Dist. LEXIS 116875, \*20 (N.D. Cal. Nov. 25, 2009) (certifying an off-  
 21 the-clock claim); cf. *Rojas v. Marko Zaninovich, Inc.*, 2013 U.S. Dist. LEXIS 46212, \*16 (E.D. Cal.  
 22 Mar. 28, 2013) (rejecting the defendant’s request to reconsider certification of an off-the-clock claim in  
 23 light of *Brinker*). Each of these cases presented the purportedly insuperable barriers to certification cited  
 24 by Cinemark (*i.e.*, inconsistent enforcement of off-the-clock policies and individual damages  
 25 calculations), yet the courts easily rejected such arguments.<sup>9</sup>

26  
 27 <sup>8</sup> It is also notable that *Collins* rejected an identical argument that Cinemark makes here. *Id.*, at  
 28 \*17 n. 7 (“the reason why an employee worked unpaid overtime is immaterial and does not raise  
 individualized issues.”) (citation omitted)

<sup>9</sup> Cinemark contends that Plaintiffs’ derivative claims are not certifiable because the underlying

1           **C.     A Class Action Is Plainly Superior To Thousands of Individual Actions**

2        ““The policy at the very core of the class action mechanism is to overcome the problem that  
 3 small recoveries do not provide the incentive for any individual to bring a solo action prosecuting his or  
 4 her rights.”” *Sullivan v. Kelly Services, Inc.*, No. C 08-3893, 2010 U.S. Dist. LEXIS 50623 (N.D. Cal.  
 5 April 27, 2010), *citing Amchem Prods. v. Windsor*, 521 U.S. 591, 617 (1997). Courts have found class  
 6 treatment superior and have certified class actions particularly when the employer’s policies affect a  
 7 large number of workers. *See, e.g., Lerwill v. Inflight Motion Pictures, Inc.*, 582 F.2d 507, 512 (9th Cir.  
 8 1978) (“[n]umerous individual actions would be expensive and time-consuming and would create the  
 9 danger of conflicting decisions as to persons similarly situated”).

10      Here, over 10,000 employees will never have their day in court absent a class action. There is no  
 11 evidence that class members would have an interest in individual control of their cases. Further, because  
 12 the class members’ individual claims are relatively modest, and the filing fee and costs would typically  
 13 exceed any potential recovery, there is not sufficient incentive for them to be brought as individual cases.  
 14 And what is more, absent class certification, Cinemark’s employees will continue to be deprived of meal  
 15 and rest breaks and reporting time pay and will continue to work off-the-clock. *Linder v. Thrifty Oil Co.*,  
 16 23 Cal.4th 429, 445-446 (2000) (“the role of the class action in deterring and addressing wrongdoing” is  
 17 pertinent to determining whether a class action is superior); *accord Zinser v. Accufix Research Inst., Inc.*,  
 18 253 F.3d 1180 (2001).<sup>10</sup> Accordingly, class treatment is superior to alternatives.

19           **D.     The Typicality Requirement Is Satisfied**

20      Representative claims are typical of the class “if they are reasonably co-extensive with those of  
 21 absent class members; they need not be substantially identical.” *Hanlon v. Chrysler Corp.*, 150 F.3d  
 22 1011, 1020 (9th Cir. 1998). The purpose of the typicality requirement is to assure that the interest of the  
 23 named representative aligns with the interests of the class.” *Hanon v. Dataproducts Corp.*, 976 F.2d  
 24 497, 508 (9th Cir. 1992).

25      Here, Plaintiffs amply satisfy the typicality requirement. All Plaintiffs worked for Cinemark as

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26      claims may not be certified. The reverse is, of course, also true. Because, as explained above, the Court  
 27 should not deny certification on the underlying wage and hour claims, the derivative claims are also  
 28 certifiable.

<sup>10</sup> There are no pending actions that could conflict with this class action. *See Fed. R. Civ. P.* 23(b)(3)(A).

1 non-exempt hourly employees. Brown Depo. at 48:17-21; De LaRosa Depo. at 96:22-97:1; Amey  
 2 Depo. at 46:11-16. All Plaintiffs were subject to Cinemark's meal and rest break policies. *See Motion at*  
 3 4:11-6:24; 12:20-21; and 16:26-17:7. All Plaintiffs suffered meal and rest break violations. Brown  
 4 Depo. at 72:20-73:5, 134:15-23, 154:11-16, 155:4-10; De LaRosa Depo. at 116:8-123:25; Amey Depo.  
 5 at 78:11-79:12, 84:25-86:8, 182:8-183:23, 131:14-19. Further, all Plaintiffs have had to work off-the-  
 6 clock without being paid for such time. Brown Depo. at 137:8-138:25, 144:8-145:16, 146:22-147:24;  
 7 De LaRosa Depo. at 252:18-24, 253:13-20, 254:6-11, 116:11-25, 119:15-120:14; Amey Depo. at 182:8-  
 8 183:23, 184:21-185:11. Finally, Brown has testified that she did not receive reporting time pay when she  
 9 was sent home after working less than half of her scheduled shift. Brown Depo. at 167:22-168:13. These  
 10 are the same illegal policies and practices challenged by this lawsuit. Thus, Cinemark's argument that  
 11 Plaintiffs are not typical of the absent class members lacks merit.

12 In any event, Cinemark's typicality attack is disingenuous because *concurrently with its motion*  
 13 *to deny certification*, Cinemark is obstructing Plaintiffs' class discovery efforts. Thus, Cinemark is  
 14 simultaneously arguing that Plaintiffs are not typical and blocking Plaintiffs' discovery efforts that would  
 15 establish typicality. Cinemark may not have it both ways.

#### 16       E.      Defendant's Adequacy Attack Is Baseless

##### 17           1.      Amey Is Adequate to Represent the Class

18 Cinemark argues that Plaintiff Amey is inadequate because he had some supervisory  
 19 responsibilities over other class members, but this purported conflict is illusory. Here, all Plaintiffs were  
 20 subject to the same policies and practices, as discussed above. Plaintiffs are not claiming that individual  
 21 managers or assistant managers developed the violative wage and hour policies; it was Cinemark that did  
 22 so. Defendant does not claim that Plaintiff Amey created a single policy. The fact that individual  
 23 managers were tasked with *implementing* these policies does not create a conflict with the class members  
 24 they supervised. Indeed, Plaintiff Amey testified that the managers themselves were and are subject to  
 25 the same policies and practices challenged by this lawsuit (*see* Amey Depo. at 55:4-56:8 and 188:5-  
 26 189:5), which is all Courts require to certify a class. *See, e.g., Staton v. Boeing Co.*, 327 F.3d 938, 959  
 27 (9th Cir. 2003) ("Plaintiffs attempting representation of nonsupervisory employees by supervisory  
 28 employees ... must offer evidence of coextensive interests or at least allege the existence of a general

1 discriminatory policy"); *Collins v. ITT Educ. Servs.*, 2013 U.S. Dist. LEXIS 183410, at \*33 (S.D. Cal.  
 2 July 29, 2013) ("where, as here, the Plaintiffs' theory is that Defendant's policies, not the ... managers,  
 3 are at fault, there is no conflict of interest if the class includes the managers") (internal citation omitted);  
 4 *In re Autozone, Inc.*, 289 F.R.D. 526, 536 (N.D. Cal. 2012) (same).

5 Moreover, even if there were a potential conflict, this does not affect the adequacy of Plaintiff  
 6 Amey to represent a subclass of Assistant Managers, nor does it affect the undisputed adequacy of the  
 7 other two named plaintiffs. Thus, the conflict still would not warrant denying certification of the case.  
 8 *Local Joint Exec. Bd. of Culinary/Bartender Trust Fund v. Las Vegas Sands, Inc.*, 244 F.3d 1152, 1162  
 9 (9th Cir. 2001) ("adequacy-of-representation requirement is satisfied as long as one of the class  
 10 representatives is an adequate class representative").

11 Cinemark's authority is easily distinguishable. For instance, in *Hughes v. WinCo Foods*, 2012  
 12 U.S. Dist. LEXIS 2469, \*23 (C.D. Cal. Jan. 4, 2012), the plaintiffs alleged that supervisors "bore  
 13 significant responsibility" for wage and hour violations at issue. By contrast, here the managers were  
 14 simply implementing Cinemark's policy of understaffing their theaters, which inevitably resulted in meal  
 15 and rest break violations and off-the-clock work. In any case, even if the Court finds that the proposed  
 16 class is overbroad because it includes some employees with supervisory responsibilities (and it should  
 17 not), the solution is not to pre-emptively deny certification but to create subclasses. *See Ortiz v.*  
 18 *Fibreboard Corp.*, 527 U.S. 815, 856 (1999) (where there are intra-class conflicts, creation of subclasses  
 19 may be appropriate).

## 20           **Cinemark's Claims Of Improper Solicitation Are Spurious**

21 Plaintiffs' counsel use of an investigator to identify and interview percipient witnesses to gather  
 22 additional evidence in support of Brown's claims before formally filing a lawsuit was both legal and  
 23 necessary under the law; the investigator's conversation with De La Rosa does not constitute improper  
 24 solicitation—indeed, it does not constitute solicitation at all.

### 25           **(a)      The Investigator Contacted Mr. De La Rosa To Investigate After** 26           **Silken Brown Contacted Capstone**

27 Plaintiff Brown's last day of work was October 3, 2012. She first contacted a Capstone attorney  
 28 several days later. Brown Depo. at 31:19-23. The original complaint in this action was filed on

1 December 3, 2012, and Brown was the only named plaintiff. Doc. 1 (“Notice of Removal”) at 2:7-14.  
2 The investigator called Plaintiff De La Rosa after Ms. Brown contacted Capstone, which was early  
3 October 2012 at the earliest. De La Rosa Depo. at 41:12-14. During that telephone call, De La Rosa told  
4 the investigator that he would like to be contacted by an attorney. *Id.* at 41:8-11, 45:14-16. On January  
5 10, 2013, Plaintiffs filed a First Amended Complaint adding De La Rosa as a plaintiff. Notice of  
6 Removal at 2:16-19.

**(b) The Investigator's Call to De La Rosa Was Not Solicitation, Much Less Improper Solicitation, Under Rule 1-400.**

9 Rule 1-400(B)(1) defines “solicitation” as any communication “[c]oncerning the availability for  
10 professional employment of a member or a law firm in which a significant motive is pecuniary gain”  
11 which is “delivered in person or by telephone.” There is no evidence that the communication by the  
12 investigator concerned Capstone’s availability for professional employment at all. *See* Rule 1-400(B)(1).  
13 De La Rosa does not recall the investigatory ever discussing with him Capstone’s availability to  
14 represent him. Declaration of Mario De La Rosa, ¶4. Rather, De La Rosa testified to a true  
15 investigatory conversation. The investigator asked, in light of the nature of Brown’s claims, about De La  
16 Rosa’s experiences with wage and hour issues at Cinemark. De La Rosa Depo at 41:3-7. Indeed, he  
17 even told De La Rosa about Brown and her then-existing claim. *Id.*, at 41:12-25.

Such investigations are not only permissible, they are required by Rule 11 and are often integral to satisfying the statutory requirements of a class action. In calling De La Rosa, the investigator was contacting a potential percipient witness. Employers routinely oppose not only class certification but class-wide discovery on the basis that the plaintiff cannot establish that her experiences were typical of those of employees at other locations the defendant maintained. *See* Motion at 20:10-15. Interviewing employees from other locations is often integral to rebutting this type of argument. Accordingly, there is no evidence that the phone call amounted to solicitation at all, much less improper solicitation.

**(c) Even If The Phone Call Had Been Solicitation—Which It Was Not—No Part Of That Phone Call Violated Rule 1-400**

27 The Rules of Professional Conduct do not prohibit all solicitation by an attorney, only improper  
28 solicitation. Otherwise, the communication is constitutionally protected. Rule 1-400(C). The Standards

1 enumerated at the end of Rule 1-400 describe circumstances under which the communication is  
 2 presumed to violate Rule 1-400.

3 For instance, in *Rose v. State Bar of California*, 49 Cal. 3d 646 (1989) on which Cinemark relies,  
 4 the attorney went to the hospital rooms of two individuals who had just suffered serious injuries in a  
 5 helicopter crash, trying to convince them to retain him for the purpose of filing a lawsuit—one of these  
 6 individuals had just been told he might never walk again. *Ohralik v. Ohio State Bar Ass'n*, 436 U.S. 447  
 7 (1978) involved similar circumstances. There, the attorney visited a prospective client, an 18-year old in  
 8 “the hospital, … lying in traction” after a car accident. *Id.* at 450. He also went to her parents’ house,  
 9 where she lived, to discuss potential representation of the adult potential client with her parents,  
 10 surreptitiously recording the conversation with a tape recorder he had concealed under his raincoat. *Id.*  
 11 He then had the potential client sign a retainer agreement while she was still in the hospital. *Id.* The  
 12 other client “was 18 years of age and not a high school graduate at the time, replied to appellant’s query  
 13 about whether she was going to file a claim by stating that she really did not understand what was going  
 14 on.” *Id.* Nonetheless, the attorney offered to represent her too and she assented. *Id.*

15 These cases, with attorneys soliciting representation of people in their hospital rooms, and  
 16 soliciting representation of people who clearly demonstrate a lack of comprehension, are presumed to be  
 17 in violation of rule 1-400. See Standards No. 4. They smack of undue influence and pressure at a time  
 18 when and in a place where the prospective client is likely to be extremely vulnerable, both physically and  
 19 emotionally. No such circumstances exist here. De La Rosa Decl., ¶ 3, 5. De La Rosa was not cornered  
 20 in a hospital room, he had not just been in an accident, there is no evidence of the investigator pressuring  
 21 De La Rosa into becoming involved in the lawsuit. De La Rosa wanted to talk to a Capstone attorney  
 22 about his experiences working at Cinemark, and he told the investigator he wanted a lawyer to contact  
 23 him. De La Rosa Decl. ¶ 3, 5. He felt no pressure to do so. *Id.* De La Rosa does not recall the  
 24 investigator ever discussing Capstone’s availability to represent him at all. *Id.* ¶ 4. There is no evidence  
 25 of any pressuring tactics by the investigator or any emotional or physical vulnerability on De La Rosa’s  
 26 behalf.

27 The only two aspects of the investigator’s phone call Cinemark suggests were improper were  
 28 not. First, Cinemark protests that the investigator apparently told De La Rosa that there was a “claim,”

1 implying this was untrue. But when the investigator called De La Rosa, Brown had already contacted  
 2 Capstone, and Brown indeed did have a claim. Therefore the investigator was correct.

3 Second, Cinemark suggests that the investigator did not tell De La Rosa how he got the latter's  
 4 contact information. But that is not what De La Rosa said during his deposition—he testified that he did  
 5 not remember. De La Rosa Depo. at 40:17-19, 42:13-43:1. Accordingly, there is no merit to  
 6 Cinemark's claim that De La Rosa was improperly solicited.

7 **F. Defendant's Attempt to Strike the Representative PAGA Claim Is Procedurally  
 8 Improper and Without Merit**

9 Cinemark argues that Plaintiffs' representative PAGA claim should be dismissed because  
 10 Plaintiffs cannot satisfy Rule 23 and because the PAGA claims would be unmanageable. As an initial  
 11 matter, Cinemark's argument is procedurally improper. While the courts may consider motions to deny  
 12 class certification, there is no precedent for striking representative PAGA allegations upon such a  
 13 motion, especially where, *as here*, Plaintiffs are not seeking class certification of their PAGA claim.  
 14 How the *representative* PAGA claim will be tried is to be discussed at the pre-trial conference after the  
 15 completion of discovery, not upon a premature motion for denial of *class certification*.

16 Further, Cinemark's position has been repeatedly rejected by the vast majority of courts,  
 17 including within this District. The Ninth Circuit recently held that because "Rule 23 and PAGA are  
 18 more dissimilar than alike [in that a] PAGA action is at heart a civil enforcement action filed on behalf of  
 19 and for the benefit of the state, not a claim for class relief" "a PAGA suit is fundamentally different than  
 20 a class action." *Baumann v. Chase Inv. Servs. Corp.*, 747 F.3d 1117, 1123-24 (9th Cir. 2014) (emphasis  
 21 added). Accordingly, even though the Ninth Circuit did not directly decide Rule 23's applicability,<sup>11</sup> the  
 22 most reasonable interpretation of *Baumann* is that Rule 23 does *not* apply to actions brought under  
 23 PAGA. Because Cinemark derives the purported manageability requirement for PAGA actions from  
 24 Rule 23, the Court should deny the motion as contrary to the reasoning in *Baumann*.

25 Indeed, one district court already applied *Baumann* to hold that PAGA actions do not need to  
 26 satisfy Rule 23. In *Villalpando v. Exel Direct Inc.*, No. 12-cv-04137 JCS, 2014 U.S. Dist. LEXIS 42622  
 27

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28 <sup>11</sup> See *id.*, at 1124 ("We do not today decide whether a federal court may allow a PAGA action  
 otherwise within its original jurisdiction to proceed under Rule 23 as a class action.")

(N.D. Cal. March 28, 2014), the court concluded that “to the extent there has been disagreement among the district courts on the question of whether Rule 23 applies to PAGA claims, *this issue has been largely resolved by the Ninth Circuit’s decision in Baumann.*” *Id.* at \*73 (emphasis added). Accordingly, *Villalpando* held that “PAGA actions, though representative, need not be brought as class actions under Rule 23.” *Id.* at \*74.

Even prior to *Baumann*, the vast majority of district courts held that PAGA actions do not need to satisfy Rule 23. *See Gallardo v. AT&T Mobility, LLC*, 937 F. Supp. 2d 1128, 1137 (N.D. Cal. 2013) (“every court to reach the issue in this district, have found that representative PAGA claims need not be certified under Rule 23 to proceed”); *Plaisted v. Dress Barn, Inc.*, No. 2:12-cv-01679-ODW (SHx), 2012 U.S. Dist. LEXIS 135599 (C.D. Cal. Sept. 20, 2012) (“the majority of federal courts [have] held that PAGA actions, though representative, need not be brought as class actions in which Rule 23’s requirements are necessarily applicable.”); *McKenzie v. Fed. Exp. Corp.*, 765 F. Supp. 2d 1222, 1234 (C.D. Cal. 2011) (“[T]he majority view—consistent with the California Supreme Court in *Arias*—is that PAGA claims are not class actions. . .”); *Thomas v. Aetna Health of Cal., Inc.*, No. 1:10-cv-01906-AWI-SKO, 2011 U.S. Dist. LEXIS 59377, \*12-13 (E.D. Cal. June 2, 2011) (“the majority view among the district courts [is that] Rule 23 certification is not necessary to the extent PAGA actions are brought in a non-class representative capacity”); *see also e.g.*, *Willner v. Manpower Inc.*, No. C 11-02846, 2012 U.S. Dist. LEXIS 62227 at \*26 (N.D. Cal. May 3, 2012); *Mendez v. Tween Brands, Inc.*, No. 2:10-cv-00072-MCE-DAD, 2010 U.S. Dist. LEXIS 66454, \*10-11 (E.D. Cal. June 30, 2010); *Sample v. Big Lot Stores, Inc.*, No. C 10-03276 SBA, 2010 U.S. Dist. LEXIS 131130, \*3 (N.D. Cal. Nov. 30, 2010); *Cardenas v. McLane Foodservice, Inc.*, No. SACV 10-473 DOC (FFMx), 2011 U.S. Dist. LEXIS 13126, \*8-9 (C.D. Cal. Jan. 31, 2011); *cf. Arias v. Superior Court*, 46 Cal. 4th 969, 980-86 (2009) (expressly rejecting the application of class action requirements to a PAGA representative action).

With respect to Rule 23’s manageability requirement specifically, *Plaisted* is directly on point. In *Plaisted*, the defendant, just as Cinemark here, claimed that the court should dismiss a PAGA action as unmanageable. The court denied the motion because “[t]o hold that a PAGA action could not be maintained because the individual assessments regarding whether a violation had occurred would make the claim unmanageable at trial would obliterate [its] purpose, as every PAGA action in some way

1 requires some individualized assessment regarding whether a Labor Code violation has occurred.” 2012  
 2 U.S. Dist. LEXIS 135599, at \*9-10; *see also Henderson v. JP Morgan Chase Bank*, 2013 U.S. Dist.  
 3 LEXIS 185101, \*19-20 (C.D. Cal. July 10, 2013) (denying defendant’s motion to strike PAGA  
 4 allegations after class certification on the grounds that the class claims were unmanageable); *Echavez v.*  
 5 *Abercrombie & Fitch Co*, 2013 U.S. Dist. LEXIS 184971, \*31 (C.D. Cal. Aug. 13, 2013) (denying  
 6 motion to strike PAGA allegations as unmanageable because the motion “amount[ed] to an argument  
 7 that the allegations should be stricken because Plaintiff may have a difficult time proving them at trial.”)

8 Cinemark’s principal authority in support of its manageability argument is *Ortiz v. CVS*  
 9 *Caremark Corp.*, No. C-12-05859 EDL, 2014 U.S. Dist. LEXIS 36833 (N.D. Cal. Mar. 18, 2014) (N.D.  
 10 Cal. March 19, 2014). *Ortiz* expressly recognized that PAGA actions are not governed by Rule 23. *Id.*  
 11 at \* 4-5. Yet, *without citing any authority permitting it to do so*, the court proceeded to apply Rule  
 12 23(b)(3)’s manageability analysis to the PAGA claims. No other court has followed *Ortiz*’s imposition  
 13 of a manageability requirement onto PAGA actions. Accordingly, *Ortiz* is, at best, an outlier decision.

14 In sum, as *Baumann* and the vast majority of district courts have recognized, class actions  
 15 brought under Rule 23 and PAGA actions are fundamentally dissimilar. They serve different goals,  
 16 different remedial schemes, and different procedural requirements. Cinemark’s attempt to conflate Rule  
 17 23 and PAGA is unsupported by the weight of authority and is inconsistent with *Baumann*.

18 **IV. CONCLUSION**

19 For the foregoing reasons, Plaintiffs respectfully request that the Court deny Cinemark’s motion  
 20 in its entirety.

21 Dated: August 13, 2014

Respectfully submitted,

22 Capstone Law APC

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24

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 26 Stan Karas  
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27

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